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In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN SAVINGS AND LOAN ASSOCIATION,
PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE
CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether claims against an insolvent, federally-insured savings and loan association must be presented in the federal receivership proceedings rather than in independent state judicial proceedings.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. 1a-11a) is reported at 180 Cal. App.3d 336, 225 Cal. Rptr. 422. The order of the California Supreme Court denying review and the opinion of the California Superior Court are unreported.

JURISDICTION

The court of appeal entered its order on April 25, 1986. The California Supreme Court denied review on July 30, 1986, and petitioner filed its petition for a writ of certiorari on October 27, 1986. The juris-

diction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT

The Federal Home Loan Bank Board (Bank Board) appointed Federal Savings and Loan Insurance Corporation (FSLIC) as the conservator and, later, the receiver for San Marino Savings and Loan Association (San Marino), a federally-insured, state-chartered institution.[1] Petitioner American Savings and Loan Association seeks review of a state court decision holding that its claims against San Marino must be brought in the FSLIC receivership proceeding, rather than in independent state judicial proceedings.

1. On February 3, 1984, the Bank Board determined that "(1) San Marino ha[d] incurred substantial dissipation of assets and earnings due to violations of law, rules and regulations and to unsafe and unsound practices; and (2) San Marino [was] in an unsafe and unsound condition to transact business" (Pet. App. 2c). The Bank Board, acting pur-

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[1] The Bank Board is an independent agency in the Executive Branch of the United States organized pursuant to the Federal Home Loan Bank Act, 12 U.S.C. 1421 *et seq.* The Bank Board has been given broad discretionary powers over the operation of the savings and loan industry, including the power to appoint FSLIC as conservator or receiver for a federally-insured savings and loan association, ex parte and without prior court approval, if the Bank Board determines that statutory grounds exist. 12 U.S.C. 1464(d)(6), 1729(c)(1)(B). The Bank Board is also the operating head of FSLIC, a corporate governmental agency that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724 *et seq.*, for insuring the accounts of all federally-chartered savings and loan associations and most state-chartered savings and loan associations.

suant to its statutory authority (12 U.S.C. 1464(d)(6), 1729(c)(1)(B)), appointed FSLIC as conservator of the institution (Pet. App. 3c-4c).

Petitioner, in 1982, had purchased a number of loans originated by San Marino. On September 21, 1984, following FSLIC's appointment as conservator, petitioner filed an action in state court against San Marino, alleging that San Marino had misrepresented the loan-to-value ratio of the loans. Petitioner sought compensatory and punitive damages and a judicial decree compelling San Marino to repurchase the loans. Petitioner also requested, through ex parte applications made without notice to FSLIC, that the state court authorize the prejudgment attachment of San Marino assets. The state court granted this request and prejudgment attachment liens were levied on assets, worth approximately $14 million, held by FSLIC as conservator for San Marino. See Pet. App. 2a-3a; Pet. 2-3.

Meanwhile, on December 6, 1984, the Bank Board determined that San Marino was insolvent, and appointed FSLIC as receiver for the institution (Pet. App. 1d-8d). The Bank Board instructed FSLIC to liquidate San Marino in accordance with the Bank Board's regulations (*id.* at 3d-4d, 1e-8e), which provide an administrative forum for creditors to assert claims against a failed association. See 12 C.F.R. 549.4, 549.5-1. The Bank Board specifically empowered FSLIC to "take appropriate action to avoid any attachments of property of San Marino obtained during the conduct of the conservatorship" (Pet. App. 5d).

2. On December 27, 1984, FSLIC moved the state court to vacate the attachment liens on San Marino's assets and to dismiss petitioner's action. FSLIC

urged that petitioner, like San Marino's other creditors, must submit its claim in the federal receivership proceedings. The state court denied FSLIC's motions. FSLIC then sought review from the state court of appeal through a petition for alternative and peremptory writs of prohibition. The court of appeal promptly issued the alternative writ commanding the lower court to refrain from further proceedings in the specified action pending appellate review (see Pet. App. 3a). On April 25, 1986, the court of appeal issued a peremptory writ of prohibition directing the superior court to dismiss petitioner's claims against San Marino and to vacate the writs of attachment issued in that action (*id.* at 1a-11a). The California Supreme Court denied petitioner's petition for review on July 30, 1986. On August 22, 1986, the superior court, pursuant to the mandate of the court of appeal, dismissed petitioner's claims against San Marino and vacated petitioner's prejudgment attachments.[2]

ARGUMENT

The court of appeal correctly instructed the lower court to vacate the attachment liens and dismiss petitioner's state court action. The decision does not conflict with any decision of this Court, of a state court of last resort, or of a federal court of appeals. Accordingly, further review by this Court is unwarranted.

1. Congress has vested the Bank Board with broad responsibility for regulating federally insured savings

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[2] While this case was pending in the state court of appeal, petitioner filed a timely claim in the federal receivership proceedings for approximately $22 million and sought a determination that it is a secured creditor by virtue of the prejudgment attachment liens obtained in state court.

and loan associations and maintaining public confidence in the thrift industry. See *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141 (1982). The Bank Protection Act of 1968, Pub. L. No. 90-389, 82 Stat. 294 *et seq.*, specifically empowers the Bank Board to appoint FSLIC as receiver for federally-insured, state-chartered, savings and loan associations experiencing financial distress. 12 U.S.C. 1729(c). Congress authorized FSLIC receiverships to assure the safety of FSLIC's insurance program, noting that "if the ability of the FSLIC to meet its insurance commitments is ever called into question, there would be grounds for serious public concern." S. Rep. 1263, 90th Cong., 2d Sess. 6 (1968).[3]

FSLIC, as receiver, is empowered by statute to liquidate a failing institution in an orderly manner. 12 U.S.C. 1729(b)(1)(A) and (c)(1)(A). Acting much like a trustee in bankruptcy, it marshals the assets of the institution and pays "all valid credit obligations," to the extent of available assets and according to the priorities of the obligations. 12 U.S.C. 1729(b)(1)(A) and (B); 12 C.F.R. 569a.4-569a.12. FSLIC, like a bankruptcy trustee, may settle or compromise claims (12 U.S.C. 1729(d); 12 C.F.R. 569a.6(c)(2)), reject contracts (12 C.F.R. 569a.6(c)(3)), and allow timely claims proved to its satisfaction (12 C.F.R. 569a.8(b)).

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[3] As the Senate report explained (S. Rep. 1263, *supra*, at 7):

> In most receivership cases, upward of 95 percent of an association's liabilities are to the FSLIC. Thus, the FSLIC has a vital stake in the proper management and disposal of the assets of an association in receivership.

Congress was well aware that "[t]he reserves of the FSLIC are not unlimited and cannot stand an indefinite repetition of unrecovered receiverships" (*id.* at 8).

Congress thus centralized control of federal savings and loan receiverships in FSLIC, subject to the Bank Board oversight. Congress also gave FSLIC broad power to take actions "that may be necessary in connection [with the liquidation], subject only to the regulation of the Federal Home Loan Bank Board." 12 U.S.C. 1729(d).[4] It specifically stated that "no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of

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[4] Prior to the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, Section 1729(d) provided as follows (12 U.S.C. (1976 ed.) 1729(d) (emphasis added)):

> In connection with the liquidation of insured institutions in default, [FSLIC] shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of *the court or other public authority* having jurisdiction over the matter.

The pre-1982 version of Section 1729(c) provided that "[i]n connection with the liquidation of any such institution, the language 'the court or other public authority having jurisdiction over the matter' in subsection (d) of this section shall mean said [Bank] Board" (12 U.S.C. (1976 ed.) 1729(c)). The Garn-St Germain Act replaced the italicized passage above with the phrase "the Federal Home Loan Bank Board" (12 U.S.C. 1729(d)). That amendment lapsed during periods of 1986, and terminated on October 13, 1986, but even in the absence of that language, the Bank Board, by appointing FSLIC as receiver, would retain exclusive authority to oversee the FSLIC receivership. See *Water Gardens I, Inc.* v. *Mainland Savings Association*, Civil No. A-86-CA-251 (W.D. Tex. Sept. 24, 1986). See also *Hancock Financial Corp.* v. *FSLIC*, 492 F.2d 1325 (9th Cir. 1974).

powers or functions of a conservator or receiver." 12 U.S.C. 1464(d)(6)(C).[5] The Bank Board's supervision of a FSLIC receivership is ultimately subject to judicial review under the Administrative Procedure Act, 5 U.S.C. (& Supp. II) 701-706. See, *e.g.*, *First Savings & Loan Ass'n* v. *First Federal Savings & Loan Ass'n*, 531 F. Supp. 251, 254 (D. Hawaii 1981). However, the receivership proceeding is the forum of first resort for determination of claims against the insolvent institution.

Under the relevant statutes and regulations, the court of appeal correctly instructed the lower court to dissolve petitioner's attachment liens and dismiss the state court action. When the Bank Board places an insolvent savings and loan association in receivership, the FSLIC's administrative claims process becomes the mandatory avenue for presentation of claims against the failed institution. Federal law plainly prohibits a claimant from bypassing this process by attaching a financially troubled institution's assets and litigating its claims in independent state proceedings. If claimants were allowed to pur-

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[5] Congress expressly recognized that FSLIC should conduct its receivership responsibilities on behalf of all claimants and that claimants would submit their claims to FSLIC rather than pursue separate court actions against the association. Thus, the Senate report states that FSLIC should—

> give due consideration to the interest of all of the claimants upon the assets of the association, including general creditors, uninsured depositors, and association stockholders. The authority of the FSLIC in this regard would be subject only to the regulation of the Federal Home Loan Bank Board and not to that of any State authority, administrative or judicial, which may previously have had regulatory authority with respect to the institution.

S. Rep. 1263, *supra*, at 10.

sue that tactic, they would obtain an unfair preference over other similarly situated creditors.[6]

2. The court of appeal's decision is fully consistent with other federal and state court decisions and expressly follows (Pet. App. 8a) *North Mississippi Savings & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), cert. denied, No. 85-294 (Jan. 13, 1986), the leading case on the subject. In *Hudspeth*, the former president of a failing savings and loan association sued the association for alleged breach of an employment contract. Subsequently, the association became insolvent, and FSLIC was appointed receiver for the association. FSLIC, as receiver, sought to dismiss the action on the ground that federal law requires that all claims against the receivership estate, including a claim for breach of an employment contract, must be pursued through the FSLIC administrative process, subject to subsequent judicial review. The court of appeals agreed, stating (756 F.2d at 1103 (citation omitted)):

> In short, all of Hudspeth's claims are switched to the administrative track by Section 1464(d)

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[6] Petitioner erroneously contends (Pet. 12-15) that 12 U.S.C. 1730(k)(1) provides the superior court with jurisdiction over petitioner's claim against San Marino. Section 1730(k)(1) is a general removal provision permitting FSLIC to remove actions in which it is a party to federal court. It does not supplant the threshold principle, set forth in 12 U.S.C. 1464(d)(6)(C), that no court, state or federal, may take any action to restrain FSLIC in exercising its prescribed receivership function. Section 1464(d)(6)(C) requires that claims against a failed association in a FSLIC receivership must be initially determined in FSLIC's administrative claims process. See *First American Federal Savings Bank* v. *Westside Federal Savings & Loan Ass'n*, 639 F. Supp. 93, 97-98 (W.D. Wash. 1986).

> (6)(C). Hudspeth can challenge the FSLIC's actions before the FHLBB, and, if unsatisfied, can seek judicial review under the APA [Administrative Procedure Act] * * *. Because the statute prevents him from going forward in any court before seeking FHLBB review, though, the district court correctly dismissed his counterclaim.

Petitioner acknowledges (Pet. 15-16) that its position is inconsistent with *Hudspeth*, but suggests that that decision should be reconsidered.[7] The Fifth Circuit recently had an opportunity to reexamine *Hudspeth* and unequivocally reaffirmed that decision in a factual context very similar to the present case. *Chupik Corporation* v. *FSLIC*, 790 F.2d 1269 (5th Cir. 1986). A Texas savings and loan association had extended loans to finance condominium construction, securing the loans with first mortgage liens on the properties. Chupik supplied materials to the projects, and when its services went uncompensated, Chupik perfected its lien right under state law. The association later failed, and FSLIC was appointed receiver. Among the assets foreclosed upon by FSLIC were the properties upon which Chupik claimed liens. When Chupik filed suit to enforce its perfected liens, FSLIC sought and received an order dismissing Chupik's suit. The Fifth Circuit affirmed, reemphasizing that the resolution of claims outside the statutory reorganization process, including claims based on perfected liens, restrains the receiver's liquidation function and is therefore impermissible (*id.* at 1270).

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[7] Petitioner relies (Pet. 15-16) on the court of appeals' initial opinion in *Hudspeth*, which the court subsequently withdrew. That opinion, repudiated by the panel that prepared it, has no precedential force.

The decision of the state court of appeal is consistent not only with these Fifth Circuit holdings but also with decisions of numerous district courts and state appellate courts. See, *e.g.*, *Lyons Savings & Loan Ass'n* v. *Westside Bancorporation*, 636 F. Supp. 576 (N.D. Ill. 1986), appeal docketed, No. 86-1793 (7th Cir. 1986); *Sunrise Savings & Loan Ass'n* v. *Lir Development Co.*, 641 F. Supp. 744 (S.D. Fla. 1986); *First American Savings Bank* v. *Westside Federal Savings & Loan Ass'n*, 639 F. Supp. 93 (W.D. Wash. 1986); *Rembold* v. *Gibraltar Savings & Loan Ass'n*, 624 F. Supp. 1006 (W.D. Wash. 1985), appeal docketed, No. 86-3658 (9th Cir. 1986); *Murdock-SC Associates* v. *Beverly Hills Savings & Loan Ass'n*, 624 F. Supp. 948 (C.D. Cal. 1985), appeal docketed, No. 86-5600 (9th Cir. 1986); *Keller* v. *Antioch Savings and Loan Ass'n*, 143 Ill. App.3d 278, 492 N.E. 2d 937 (1986). The state court of appeal's decision does not conflict with any decision of this Court, of a state court of last resort, or a federal court of appeals.

3. Petitioner contends that, even if dismissal of actions against failed associations in FSLIC receiverships is generally proper, the court of appeal erred in dismissing petitioner's action against San Marino because the dismissal will result in "the nullification and destruction of [petitioner's] valid attachment liens" (Pet. 6), resulting in a "loss of [petitioner's] security interest in specific property" (*id.* at 12). The court of appeal correctly recognized, however, that "American has not established a secured claim. The writ of attachment is merely a device by which [petitioner] seeks to gain a preference over *other unsecured* creditors" (Pet. App. 9a (emphasis in

original, citation omitted)). As the court explained (*id.* at 9a-10a):

> Here, the dismissal of [petitioner's] suit will not result in the loss of its opportunity to gain a priority claim; the resolution of that claim will simply be transferred to an administrative forum. The FSLIC, as receiver, is empowered to consider all claims for security (See 12 C.F.R. §§ 549.4, 549.5, 549.5-1, 569a.8 (1985)). * * * Even though [petitioner's] attachment will be discharged as a result of the dismissal of its action, [petitioner] will still have the opportunity to present a claim for security (in effect for priority) in the liquidation of San Marino to the extent of the proceeds received from the sale of the previously attached property.

Petitioner is entitled to both administrative and judicial review of rulings made in the FSLIC receivership proceeding. Thus, petitioner's contention that it has been deprived of a property right, even if it were meritorious, is plainly premature. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 688-689 (1981).[8]

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[8] The state court also identified an independent state ground supporting affirmance, noting that "[i]t is well settled in this state that 'a litigant must invoke and exhaust an administrative remedy provided by statute before he may resort to the courts * * *' " (Pet. App. 10a (quoting *United States* v. *Superior Court*, 19 Cal.2d 189, 194 (1941)). The court apparently reasoned that exhaustion of the federal administrative remedy would be required as a matter of *state* law, as well as federal law, before a state court could provide a judicial remedy. See Pet. App. 10a-11a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1986

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